

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
BRIEF**

Appellate
77-6073

To be argued by
NATHANIEL L. GERBER

**United States Court of Appeals
FOR THE SECOND CIRCUIT**

Docket No. 77-6073

MOBIL OIL CORPORATION; GULF OIL CORPORATION, SHELL OIL COMPANY and STANDARD OIL COMPANY OF CALIFORNIA,

Plaintiffs-Appellees,

—against—

FEDERAL TRADE COMMISSION and MICHAEL PERTSCHUK, Chairman, PAUL RAND DIXON, Member, M. ELIZABETH HANFORD DOLE Member, CALVIN J. COLLIER, Member and DAVID A. CLANTON, Member and CAROL M. THOMAS, Secretary; as officers of the FEDERAL TRADE COMMISSION,

Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

APPELLANTS' BRIEF

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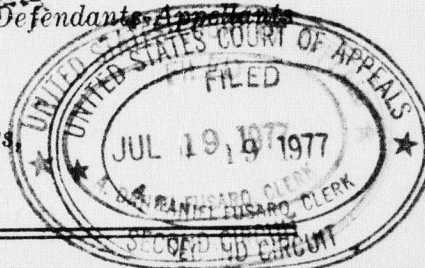




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Chairman, PAUL RAND DIXON, Member, M. ELIZA-
BETH HANFJRD DOLE, Member, CALVIN J. COLLIER,
Member and DAVID A. CLANTON, Member and CAROL
M. THOMAS, Secretary; as officers of the FEDERAL
TRADE COMMISSION,

Defendants-Appellants.

APPELLANTS' BRIEF

Preliminary Statement

The Federal Trade Commission and its named members and officers (collectively the "Commission") have taken this appeal from an opinion and order of the United States District Court for the Southern District of New York, Honorable John M. Cannella, Judge, that is without precedent (A. 72-124).^{*} In its decision, the District Court directed the Commission to prepare a draft Environmental Impact Statement ("EIS") pursuant to Sec-

^{*} "A." refers to the Joint Appendix filed in connection with this appeal.

tion 102 (2) (C) of the National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4332 (2) (C), in connection with an ongoing adjudicatory proceeding pending before the Commission (*In the Matter of Exxon Corporation, et al.*) ("Exxon") on a complaint charging the nation's major oil companies, including plaintiffs-appellees, with various violations of the anti-trust laws. The Court held that the EIS should have been prepared by the Commission even prior to its issuance of the administrative complaint in *Exxon* which initiated the proceeding to determine whether the administrative respondents had violated the antitrust laws. In so ruling, the Court declared null and void Rule 1.82(d) of the Commission's Rules of Practice, 16 C.F.R. § 1.82(d), which exempts from NEPA's EIS requirement, *inter alia*, adjudicatory proceedings and law enforcement investigations commenced by the Commission.

In addition to this opinion, entered March 2, 1977, the Commission also appeals from a supplemental memorandum decision, entered March 15, 1977, insofar as that decision directed the Commission to complete the draft EIS on or before September 12, 1977 and to submit a status report of compliance on or before July 11, 1977 (A. 169-174).

As is demonstrated hereinafter, the District Court's decision is not supported by the language of NEPA or its legislative history, finds no support in its interpretative case law, and is directly contrary to the decision of the United States Court of Appeals for the District of Columbia Circuit in *Gifford-Hill & Co., Inc. v. Federal Trade Commission*, 523 F.2d 730 (D.C. Cir. 1975) (*per curiam*), *aff'd* 389 F. Supp. 167 (D.D.C. 1974), which rejected the identical claim asserted herein with the telling observation that:

NEPA's concern is with protection of the environment, not with the desire of parties to prevent or delay administrative efforts to enforce the

antitrust laws. 523 F.2d at 732 [Footnote omitted].

Issues Presented

1. Are adjudicatory antitrust proceedings initiated by the Commission subject to the Environmental Impact Statement requirements of NEPA?
2. Has there been any proposal of federal action by the Commission in *Exxon* which as a practical matter could be the subject of an Environmental Impact Statement?
3. Has there ever been any proposal of federal action in *Exxon* within the meaning of NEPA?
4. Does the conduct of adjudicatory proceedings by an independent regulatory agency in itself constitute an irreversible commitment of resources within the meaning of NEPA?
5. Do plaintiffs have standing to maintain this action?

Prior Proceedings

A. Prior Administrative Proceedings

Exxon was commenced July 18, 1973 with the issuance of a complaint by the Commission charging plaintiffs and four other major oil companies with violating Section 5 of the Federal Trade Commission Act 15 U.S.C. § 45 (A. 203-216). Section 5 of the Act authorizes and directs the Commission to issue a complaint when it has "reason to believe" that a violation of law has occurred and that issuance of the complaint would

be in the public interest. The complaint issued in *Exxon* charges the respondents, including plaintiffs herein, with combining or agreeing to monopolize the refining of crude oil into petroleum products, maintaining monopoly power over the refining of crude oil into petroleum products, and restraining trade and maintaining a non-competitive market structure in the refining of crude oil into petroleum products, all in violation of Section 5(a) (1) of the Federal Trade Commission Act, 15 U.S.C. § 45(a) (1).

More specifically, the administrative respondents named in the *Exxon* complaint—Exxon Corporation, Texaco, Inc., Gulf Oil Corporation, Mobil Oil Corporation, Standard Oil Company of California, Standard Oil Company of Indiana, Shell Oil Corporation and the Atlantic Richfield Company—were identified in the complaint as respectively the nation's first, third, sixth, seventh, ninth, twelfth, fourteenth and sixteenth largest petroleum companies (A. 204-206). Among the unlawful acts and practices which these companies are alleged to have engaged in are the following (A. 209-211):

1. Pursuing a common course of action to abuse and exploit the ownership and control of the means of gathering and transporting crude oil to refineries;
2. Pursuing a common course of action in participating in restrictive or exclusionary transfers of ownership of crude oil among themselves and with other petroleum companies;
3. Pursuing a common course of action in adhering to a system of posted prices leading to the maintenance of an artificial level for the price of crude oil;
4. Entering into numerous processing arrangements with independent refiners thereby expanding their control over refining capacity and limiting the availability of refined petroleum products to independent marketers and potential entrants into marketing;

5. Pursuing a common course of action in refusing to sell gasoline and other refined petroleum products to independent marketers;

6. Pursuing a common course of action in participating in restrictive or exclusionary exchanges and sales of gasoline and other refined petroleum products among themselves and with other petroleum companies;

7. Pursuing a common course of action in their marketing practices thereby avoiding price competition in the marketing of refined petroleum products.

These acts and practices are alleged to have had, among others, the following harmful effects upon the public interest (A. 211-213):

1. Respondents have established and maintained artificial price levels for the goods and services rendered at each level of the petroleum industry.

2. Barriers to entry into the refining of petroleum products have been raised, strengthened and otherwise increased.

3. The burden of shortages of petroleum products has been forced to fall with particular severity on those sections of the United States, east of the Rockies, where independent refiners and marketers are concentrated, thereby eliminating the most significant source of price competition in the marketing of petroleum products and threatening the competitive viability and existence of the independent sector.

4. Independent marketers have been forced to close retail outlets and significantly curtail retail operations because of their inability to obtain refined products.

5. Respondents have obtained profits and returns on investment substantially in excess of those that they would have obtained in a competitively structured market.

6. American consumers have been forced to pay substantially higher prices for petroleum and petroleum products than they would have had to pay in a competitively structured market.

Pursuant to Rule 3.42 of the Commission's Rules of Practice, 16 C.F.R. § 3.42, *Exxon* is currently pending before an administrative law judge who has responsibility in the first instance for ruling on all motions and discovery requests, conducting the trial and issuing an initial decision. Members of the Commission staff—complaint counsel—are responsible for prosecuting the Commission's complaint from discovery through trial before the administrative law judge and, if taken, appeal to the Commission. The members of the Commission, as distinct from complaint counsel, have no role in the prosecution of the complaint and function as an appellate tribunal. In furtherance of this distinction, Rule 4.7 of the Commission's Rules of Practice, 16 C.F.R. § 4.7, prohibits all *ex parte* communications concerning the merits of a proceeding such as *Exxon* or any factually related proceeding between the Commission or the administrative law judge and any person performing an investigative or prosecutorial function in connection therewith.

Exxon is presently in the initial stages of discovery. Complaint counsel are seeking to obtain information relevant to: (1) Whether respondents have violated the Federal Trade Commission Act as alleged in the complaint; and, (2) If such violations are established, what would constitute appropriate remedies. Given the extent of information that must be discovered by complaint counsel, the administrative law judge presiding in *Exxon* has estimated that discovery will not be completed for at least five years (A. 192). This projection was predicated upon "the most favorable of circumstances" and specifically

assumed that complaint counsel would not need judicial enforcement of the subpoenas issued by the administrative law judge.

In fact, however, respondents' continuing efforts to resist the subpoenas have rebutted the basis of the five years projection and discovery proceedings have been subject to numerous lengthy delays. The administrative law judge issued the first subpoenas *duces tecum* to the respondents on November 24, 1976.* Although these subpoenas had a return date of January 24, 1977, which was stayed until February 3, 1977, some respondents advised complaint counsel and the administrative law judge that they would not begin producing any documents until April or May, 1977. The respondents have opposed nearly every one of the document specifications contained in the subpoenas. Five respondents, including three of the four plaintiffs, have refused to provide "confidential" documents required by the subpoenas until they receive a protective order from a federal court more restrictive than that issued by the Commission.** A sixth respondent has declined to produce any documents pursuant to the subpoenas (A. 191-192). As a result of these tactics, the Commission has directed that judicial enforcement of the subpoenas be sought.

Rule 3.11(b)(3) of the Commission's Rules of Practice, 16 C.F.R. § 3.11(b)(3), provides that upon the issuance of a complaint by the Commission, it shall contain "[w]here practical, a form of order which the Commission has reason to believe should issue if the facts are found to be as alleged in the complaint." (Emphasis added). Although pursuant to this Rule, the Commis-

* January 17, 1977 for Mobil Oil Corporation.

** Cf. *Exxon Corp. v. FTC*, CCH 1977-1 Trade Cas. ¶ 61464 (D. Del. April 18, 1977).

sion has invariably included a proposal for relief in its complaints, it departed from this practice in the *Exxon* complaint and chose to postpone any such proposal until after the merits of the complaint had been adjudicated. The Commission so stated by appending to the complaint the following "Notice of Contemplated Relief":

Should the Commission conclude from the record developed in any adjudicative proceeding in this matter that the respondents are in violation of Section 5 of the Federal Trade Commission Act as alleged in the Complaint, the Commission may order such relief as is necessary or appropriate in order to correct or remedy the effects of anti-competitive practices engaged in by the respondents and to restore competition in the relevant market or markets (A. 215).

Although the Commission has not articulated the basis of its decision not to propose relief in *Exxon*, it is clear from the above notice that the Commission does not intend to formulate any proposal for relief unless and until respondents are found to have violated the Federal Trade Commission Act as presently charged (A. 228). Other than this notice, the Commission has not issued any statement or taken any position with respect to relief in *Exxon* (A. 186).*

* On October 23, 1975, the Commission rejected a recommendation of the presiding administrative law judge that the complaint be withdrawn:

This matter is before us upon an order dated October 17, 1975, certifying the administrative law judge's recommendation that the Commission consider withdrawal of the complaint. The Commission has considered the law judge's recommendation and has determined that the complaint should not be withdrawn. (A. 231).

In its order, the Commission took no position nor did it make any statement, express or otherwise, with respect to the question of relief.

Although the District Court found that the Commission had made a proposal of relief in *Exxon* warranting the preparation of an EIS, the only such "proposal" ever made was a statement of contemplated relief offered by complaint counsel on February 22, 1974, shortly after the *Exxon* complaint was filed (A. 188-189). At that time, complaint counsel were directed by the presiding administrative law judge to file a statement of their intentions as to the relief then contemplated by complaint counsel. In response to this direction, complaint counsel did not propose specific relief but rather defined the categories of relief that they intended to request in the event that a violation were found (A. 188, 195). These categories were the following (A. 217-221):

- (1) Divestiture of 40 to 60 percent of respondents' refinery capacity;
- (2) Divestiture of some pipelines that transport crude oil to and refined products from the divested refineries;
- (3) A ban against future refinery acquisitions by respondents;
- (4) Limitations upon respondents' joint ventures;
- (5) Limitations upon "processing arrangements"—arrangements whereby respondents rent independent refinery capacity; and *possibly*
- (6) Limitations on the common industry practice of trading crude oil and refined products as opposed to their purchase and sale.

None of these relief categories specified the identity, location, or, with respect to any given respondent, the exact percentage of the refineries to be divested. Similarly, there has never been any specification as to the nature or extent of the various limitations that might be imposed upon respondents' operations. Simultaneously

with the offering of these categories complaint counsel stated that they were subject to change during the balance of the proceedings, were offered only "on the basis of [then] current information," and that:

[t]he appropriateness of these remedies of course will be determined on the basis of a full litigative hearing before the administrative law judge. It may be that, on the basis of such hearings, the proposed relief may be modified. (A. 218)

Moreover, these categories were not approved, endorsed or commented upon by the Commission prior to their submission to the administrative law judge; the Commission has not approved, endorsed or commented upon any element of these suggested relief proposals at any time since their submission (A. 188, 228).

B. Prior Proceedings in the District Court

Plaintiffs instituted the instant action on June 6, 1975, seeking a declaratory judgment that Rule 1.82(d) of the Commission's Rules of Practice, 16 C.F.R. §1.82(d), is invalid and that *Exxon* is a "major federal action significantly affecting the quality of the human environment" within the meaning of Section 102(2)(C) of NEPA, 42 U.S.C. § 4332(2)(C), such as would require the preparation of an EIS (A. 15).^{*} On March

^{*} This is not the only collateral action which the various respondents in *Exxon* have instituted against the Commission. In *Standard Oil Co. v. FTC*, No. 74-1396 (N.D. Cal. Oct. 29, 1975), respondents contended that the Commission did not have "reason to believe" that the violations charged in *Exxon* had in fact occurred, as is required by Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45. The District Court sustained the Commission, and an appeal is currently pending in the 9th Circuit, No. 75-1341. In *Exxon Corp. v. FTC*, 411 F. Supp. 1352 (D.

[Footnote continued on following page]

2, 1977, in response to motions for summary judgment filed during September, 1975, the District Court issued an opinion and order wherein it granted plaintiffs' motion for summary judgment, holding that Rule 1.82(d) was invalid and directing the Commission to immediately begin the preparation of a draft EIS in connection with *Exxon*.

In its decision of March 2, the District Court held that plaintiffs had standing to maintain the action based upon their allegation "that *the relief requested by the FTC* in the enforcement proceeding would result in unnecessary depletion of our nation's natural resources" (A. 81-82) (Emphasis added). The District Court was further persuaded by plaintiffs' argument that if the relief allegedly proposed by the Commission were granted, plaintiffs would be compelled to engage in new refining and resource exploration in response thereto. The Court noted that it was:

persuaded by plaintiffs' argument that an increase in domestic exploration and production 'would, by its very terms, change the scope and speed with which domestic reserves are developed and depleted, thereby affecting vital supplies of natural resources,' and agrees that '[t]his intention to alter the way in which society's resources are used in and of itself supplies sufficient need for an impact statement.' (A. 80) [Footnotes omitted].

Del. 1976), respondents challenged the authority of the administrative law judge to order them to preserve documents prior to the issuance of a subpoena. The District Court vacated the administrative law judge's order and remanded the matter for further factual findings. As noted above, in *Exxon Corp v. FTC*, CCH 1977-1 Trade Cas. ¶ 61464 (D. Del. 1977), most of the respondents seek a protective order going beyond the limits imposed by the Commissioner concerning confidentiality of information to be gathered from the respondents by discovery in *Exxon*.

The Court concluded that the Commission's adjudicatory proceedings aimed at enforcing the nation's anti-trust laws, specifically the Federal Trade Commission Act, fell within the scope of NEPA and that *Exxon* constituted a major federal action significantly affecting the environment (A. 112). Having so found, the Court declared null and void Rule 1.82(d) of the Commission's Rules of Practice, 16 C.F.R. § 1.82(d), which exempts from NEPA's EIS requirement all adjudicatory proceedings and law enforcement investigations commenced by the Commission.*

Shortly after the decision of March 2, plaintiffs made a supplemental application seeking to enjoin any further action by the Commission in *Exxon* pending the completion and filing of the aforementioned EIS. On March 15, 1977, the District Court issued a memorandum decision wherein it denied plaintiffs' application on the ground that no irreparable injury would flow to the environment through the continuation of *Exxon* simultaneously with the preparation of an EIS. However, the Court directed the Commission to complete the draft EIS by September 12, 1977, and to submit a status report of compliance by July 11, 1977.

* Judge Cannella invalidated Rule 1.82(d) in its entirety notwithstanding that the only issue raised was its validity in the context of adjudicatory proceedings such as *Exxon*. In fact, Rule 1.82(d) exempts from the EIS requirement not only formal adjudicatory proceedings commenced by the Commission, but also "any investigation made by the Commission for law enforcement purposes; any process or order issued by the Commission in connection with any type of investigation; [and] any agreement of voluntary compliance or consent decree entered into by the Commission..." There is nothing in the record of this case warranting the Court's blanket ruling regarding Section 1.82(d) as applied to different types of proceedings. Thus, even if this Court were to affirm the decision below, modification of the declaratory judgment to restrict its effect upon Section 1.82(d) to adjudicatory proceedings is necessary.

On May 3, 1977, the District Court issued a second memorandum decision denying the Commission's motion for a stay pending appeal. Notwithstanding the denial of the Commission's motion, Judge Cannella conceded "that a reversal on appeal is more than a remote possibility" (A. 291). The Commission thereupon applied to this Court for a stay of the District Court's order pending determination of this appeal. By order dated June 22, 1977, a panel of this Court consisting of Judges Gurfein and Van Graafeiland granted the Commission's motion and scheduled this appeal for expedited briefing and argument during the week of August 15, 1977.

ARGUMENT

Summary

Based upon the language of NEPA and its legislative history, the Commission contends that the Act was intended to focus upon prospective issues of environmental management in executive agency policy and program decisionmaking rather than adjudicatory proceedings by independent regulatory agencies whose purpose is to determine whether federal antitrust statutes have been violated and if so to remedy the violations. Application of NEPA's EIS requirement to such proceedings, whether conducted before the Commission or in a judicial forum would infringe the agency's prosecutorial discretion and would preclude the effective and timely enforcement of the antitrust laws, a result which NEPA was not intended to bring about. The Supreme Court has stated on at least two recent occasions that NEPA was not intended to repeal by implication any other statute and that it must give way where a clear and unavoidable conflict in statutory authority exists. *United States v. Students Challenging Regulatory Agency Procedures* (hereinafter *SCRAP I*), 412 U.S. 669, 694 (1973); *Flint Ridge Development Co. v. Scenic Rivers Association*, — U.S. —, 96 S. Ct. 2430, 2438 (1976). Such

a conflict would inevitably result from the decision of the District Court. Given the well established principle that repeal of the nation's antitrust laws is not to be lightly implied, *United States v. Philadelphia National Bank*, 374 U.S. 321 (1963); *Silver v. New Stock Exchange*, 373 U.S. 341 (1963), the decision below is not supported by judicial interpretations of the scope of NEPA or the anti-trust laws and is erroneous.

Even if it be determined, however, that the EIS requirement may apply to *Exxon* at some future stage of the proceeding, Judge Cannella erred in ordering the preparation of an EIS at the present stage of *Exxon*. First, NEPA would not require the preparation of an EIS until there has been a *proposal of relief by the agency*. See *Kleppe v. Sierra Club*, 427 U.S. 390, 406, n. 15 (1976); *Aberdeen and Rockfish R.R. v. Students Challenging Regulatory Agency Procedures* (hereinafter *SCRAP II*) 422 U.S. 289, 320 (1975). First the *Commission* has not yet proposed any relief in *Exxon* and will not have occasion to do so unless and until respondents are adjudged to have committed the violations charged in the complaint. Second, there does not exist a sufficient factual predicate for the preparation of the EIS, given the tentative and speculative character of complaint counsel's statement of contemplated relief upon which Judge Cannella's decision is based. Third, Judge Cannella improperly departed from NEPA's precise statutory requirements regarding the timing of an EIS and, by an improper balancing of court-devised factors, erroneously concluded that unless an EIS were prepared at this stage of *Exxon*, an irretrievable commitment of resources would occur.

Finally, the only particularized injury which plaintiffs have asserted is entirely economic, as is the interest they seek to protect. As the District Court recognized, such economic injury is not within the scope of interests which NEPA was intended to protect. Moreover, even if the asserted interest were within the scope of

NEPA's intended protection, the alleged injury is at best conjectural and remote. Plaintiffs therefore lack standing to maintain this action.

POINT I

NEPA'S EIS REQUIREMENTS DO NOT APPLY TO ADJUDICATORY PROCEEDINGS OF THE COMMISSION.

NEPA is and was intended to be a statute of broad application to governmental activities. 42 U.S.C. § 4331. The Act provides *inter alia* that "to the fullest extent possible" all federal agencies shall develop methods and procedures to insure that environmental factors will be given appropriate consideration in decisionmaking and that alternatives to proposed courses of action will be considered. 42 U.S.C. §§ 4332(2)(B) and (D). Another requirement of NEPA is that in connection with "every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment" the agency shall prepare an EIS detailing the environmental impact of the proposed action, as well as discussing alternatives to that action. 42 U.S.C. § 4332(2)(C).

The Commission has recognized the application of NEPA's EIS requirement to its rulemaking proceedings and legislative proposals. See 16 C.F.R. § 1.82. Similarly, the Commission does not dispute the applicability of NEPA—other than its EIS requirement—to its adjudicatory activities aimed at enforcing the Federal Trade Commission Act. It is the Commission's position, however, that Judge Cannella erred when he held in his opinion of March 2, that the EIS requirement applies to adjudicatory proceedings such as *Exxon* conducted before independent regulatory bodies pursuant to specific law enforcement authority. Its language and legislative history indicate that NEPA was intended to inject environmental consid-

erations into the conduct of discretionary activities concerning programs and policies rather than law enforcement activities whose purpose is to ascertain whether or not a Congressionally declared policy has been violated and, if so, to redress such violation.

Section 101 of NEPA, 42 U.S.C. §4331, which contains the congressional declaration of national environmental policy, indicates clearly that the focus of congressional concern was with those environmental harms caused by population growth, high-density urbanization, industrial expansion, resource exploitation and technological advances, and that NEPA was intended to apply to activities having a direct impact upon resource planning and environmental management. In order to carry out the policies dictated by these environmental concerns without unduly disrupting other essential government functions, Section 101(b) NEPA's implementation section, declares that it is the responsibility of the Government "to use all practicable means, *consisted with other essential considerations of national policy*, to improve and coordinate Federal plans, functions, programs, and resources. . . ." 42 U.S.C. § 4331(b). (Emphasis added). Section 102(2)(C), 42 U.S.C. § 4332(2)(C), which sets forth the EIS requirement, the only requirement of NEPA whose applicability to *Exxon* is disputed, provides that an EIS must be prepared in connection with ". . . major federal actions significantly affecting the quality of the human environment. . ."

Nowhere in the text of the Act is there any suggestion that actions falling within the scope of the EIS requirement include law enforcement activities or adjudications such as those conducted by the Commission. In *Scientists' Institute for Public Information, Inc., v. Atomic Energy Commission*, 481 F.2d 1079, 1088-1089 (D.C. Cir. 1973), the District of Columbia Circuit reviewed the legislative history surrounding the term "major federal actions" in the context of the EIS requirement with the following observation:

The legislative history of the Act indicates that the term 'actions' refers not only to construction of particular facilities, but includes 'project proposals, proposals for new legislation, regulations, policy statements, or expansion or revision of ongoing programs * * *' [Citing S. Rep. No. 1-296, 91st Cong., 1st Sess., 20 (1969), U.S. Code. Cong. & Admin. News 1969, p. 2751]. *Thus there is 'Federal action' within the meaning of the statute not only when an agency proposes to build a facility itself, but also whenever an agency makes a decision which permits action by other parties which will affect the quality of the environment.* NEPA's impact statement procedure has been held to apply where a federal agency approves a lease of land to private parties, grants licenses and permits to private parties, or approves and funds state highway projects. In each of these instances the federal agency took action affecting the environment in the sense that the agency made a decision which permitted some other party—private or governmental—to take action affecting the environment. [Footnotes omitted] [Emphasis supplied]

See also *Natural Resources Defense Council, Inc. v. United States Nuclear Regulatory Commission*, 539 F.2d 824, 841 n. 11 (2d Cir. 1976), *cert. granted*, 45 U.S.L.W. 3651 (March 29, 1977).

Adjudicatory proceedings, and *Exxon* in particular, do not fit within any of these categories. The adjudication of whether or not the *Exxon* respondents have violated the antitrust laws is neither agency action directed toward the environment nor authorization to others to take such actions and therefore is outside the scope of the EIS requirement. *Gifford-Hill & Co., Inc. v. F.T.C.*, *supra*, 523 F.2d at 733. Rather, it is the enforcement of Congressionally enacted statutes, a task which Congress has expressly empowered and obligated the Commission to carry

out. If Congress had intended to subject the enforcement of public interest statutes such as the Federal Trade Commission Act to the EIS requirements of NEPA, it would have clearly indicated as much in the language of the Act and its legislative history. There being no such indication, express or otherwise, Judge Cannella's expanded interpretation of NEPA's scope is erroneous.

The error below, however, is not limited to the interpretation of NEPA's EIS requirement. As noted above, the requirements of NEPA are to be fulfilled to the extent *consistent with other essential consideration of national policy*. 42 U.S.C. § 4331(b). NEPA also provides:

The policies and goals set forth in this chapter are *supplementary* to those set forth in existing authorizations of Federal agencies. (Emphasis supplied).

Section 1005, 42 U.S.C. § 4335. The Supreme Court has held that NEPA was not intended to repeal by implication any other statute, *SCRAP I, supra*, 412 U.S. at 694; and that "where a clear and unavoidable conflict in statutory authority exists, NEPA must give way . . ." *Flint Ridge Development Co. v. Scenic Rivers Association, supra*, 96 S.Ct. at 2438.

The effect of the District Court's construction of NEPA's EIS requirement is to create a clear and unavoidable conflict with the Federal Trade Commission Act by impairing the Commission's capacity to fulfill its statutory mandate to enforce the antitrust provisions of that Act. Specifically, in light of the ruling below that an EIS must be prepared prior to the issuance of the administrative complaint, the Commission's prosecutorial discretion would be restricted: The Commission would be required to subject its cases to public review, collateral attack and judicial scrutiny even before the commencement of the pro-

ceeding and prior to the discovery of the information necessary to a proper adjudication.*

To infer that NEPA was intended to require an EIS before a regulatory agency could issue a complaint to enforce the laws of the United States would be inconsistent with the traditional judicial deference accorded the executive branch in its prosecutorial capacity. Under the doctrine of separation of powers, courts have been loathe to interfere with the prosecutorial functions of the Executive, *see United States v. Brown*, 481 F.2d 1035, 1043 (8th Cir. 1973); *Newman v. United States*, 382 F.2d 479, 480 (D.C. Cir. 1967) (Burger, J.); *United States v. Cox*, 342 F.2d 167, 171 (5th Cir. 1965), *cert. denied*, 381 U.S. 935,** or to find that Congress has so interfered.

* According to CEQ guidelines, 40 C.F.R. Part 1500, a draft EIS is to be reviewed by all federal agencies which may have special expertise with respect to the environmental impact involved, 40 C.F.R. § 1500.9(a), by state and local environmental agencies, *Id.* § 1500.9(c), and by interested members of the public. *Id.* § 1500.9(d). After the draft EIS has been circulated for comment, a final EIS must be prepared incorporating the comments from the agencies and the public. *Id.* § 1500.10. These regulations require that "no administrative action subject to § 102(2) (C) [42 U.S.C. § 4332(2) (C)] is to be taken sooner than 90 days after a draft EIS has been circulated for comment" nor sooner than 30 days after a final EIS has been filed with the CEQ. *Id.* § 1500.11(b). Thus if the EIS requirement is held to apply to the Commission's prosecutorial functions, the Commission would be required to wait *at least* 90 days after notifying the public that it is considering issuing a complaint before it may actually do so. Once an EIS is issued, it is subject to attack in the courts challenging its substantive sufficiency, which obviously can entail additional delays.

** In oft quoted language, the Fifth Circuit held that [the United States Attorney is] an executive official of the Government, and it is as an officer of the executive department that he exercises a discretion whether or not there shall be a prosecution in a particular case. It follows, as an incident of the constitutional separation of powers that the courts are not to interfere with the free exercise of the attorneys of the United States in their control over criminal prosecutions. *United States v. Cox*, *supra*, 342 F.2d at 171.

Inmates of Attica Correctional Facility v. Rockefeller, 477 F.2d 375, 381-82 (2d Cir. 1968); *United States v. Cowan*, 524 F.2d 504 (5th Cir. 1975), *cert. denied*, 425 U.S. 971 (1976). The judicial deference accorded executive prosecutorial discretion regarding who and whether to prosecute applies equally to prosecutorial decisions of the Commission. Davis, *Administrative Law Treatise*, (1970 Supp.) § 28.16, p. 989 ("the degree of commitment of action to administrative discretion is no more and no less in the case of the FTC than in the case of any other prosecuting authority, including all criminal prosecutions—federal, state and local").

This Court, and other courts of appeals, have considered, in the context of other law enforcement statutes, whether in enacting such statutes, Congress intended to interfere with the executive's prosecutorial discretion. *Inmates of Attica*, *supra*, 477 F.2d 375; *Cowan*, *supra*, 524 F.2d 504. These cases indicate that such legislation is not to be construed as in any way diminishing the executive's prosecutorial discretion, unless it clearly appears that Congress so intended. Thus, in *Inmates of Attica*, *supra*, 477 F.2d at 381-82, the Second Circuit held that the courts lack authority to compel the prosecution of certain persons, even though the statute "authorized and required [the United States Attorney] to institute prosecutions against all persons violating [the Act]." 42 U.S.C. § 1987 (emphasis added). Noting that other statutes authorizing federal prosecutions use similar language, this Court held that the mandatory nature of the word "required" did not indicate a congressional intent to interfere with the prosecutorial discretion involved in deciding when and whether to prosecute or investigate a case. *Inmates of Attica*, *supra*, 477 F.2d at 381-82. See *Powell v. Katzenbach*, 359 F.2d 234, 235 (D.C. Cir. 1965). Similarly, in *United States v. Cowan*, *supra*, 524 F.2d 504, at issue was the meaning of Rule 48a of the Federal Rules of Criminal Procedure which provides that the United States Attorney "may by leave of court" file

a dismissal to terminate a criminal prosecution. In light of the separation of powers, the Fifth Circuit narrowly interpreted the "by leave of court" language to mean that the court should not disturb the exercise of executive discretion to terminate a pending proceeding except where termination was "clearly contrary to manifest public interest." * *Id.* at 513. These cases illustrate the judiciary's appropriate reluctance to construe a congressional enactment as impinging upon the prosecutorial discretion committed by the Constitution to the executive branch. See U.S. Const. art. II, §§ 1 and 3.

While requiring the Executive to take environmental factors into consideration when deciding whether to prosecute a case may not be inconsistent with the exercise of its prosecutorial discretion, it is clear that requiring an EIS to be prepared and circulated is inconsistent with the executive's prosecutorial functions. Nowhere does NEPA or its legislative history indicate that the EIS requirement was intended to apply to the prosecutorial activities of law enforcement agencies. Therefore, in light of the judicial reluctance to find a congressional intent to interfere with the executive's prosecutorial functions in statutes and rules specifically addressing law enforcement procedures, this Court should not now find that Congress intended to interfere with the Commission's prosecutorial role when it enacted NEPA.

Application of NEPA's EIS requirement to the Commission's enforcement process would not only preclude the Commission's fulfillment of its mandate to enforce the Federal Trade Commission Act but would in addition facilitate noncompliance by those who seek to violate the

* The Fifth Circuit indicated that in order to deny leave to dismiss, a court would be required to find that the presumption of the government's good faith had been overcome, and establish that the government betrayed the public interest. *Id.* at 514.

Act and whose unlawful activity it was intended to prohibit. In the context of a proceeding as far reaching and complex as *Exxon*, the requirement of an EIS could reasonably be expected to forestall any progress in that proceeding for years. That this was plaintiffs' intention throughout was demonstrated by their post judgment application for an order totally enjoining the further prosecution of *Exxon* pending the preparation and filing of an EIS. The District Court so observed in its decision of March 15 denying that application (A. 173):

It would be naive, however, to lose sight of plaintiffs' interest in delaying the FTC's action for as long as possible.

Under such circumstances, permitting plaintiffs to delay an adjudication as to whether they have violated the antitrust laws by invoking NEPA would constitute an unwarranted interference with the Commission's Congressional mandate.

That NEPA's EIS requirement does not apply to Commission adjudicatory proceedings such as *Exxon* has been endorsed not only by the Court of Appeals for the District of Columbia Circuit in *Gifford-Hill*, *supra*, 523 F.2d 730, but also by the Council on Environmental Quality ("CEQ"), whose interpretation of statutory requirements under NEPA is entitled to great deferences. *Warm Springs Dam Task Force v. Gribble*, 417 U.S. 1301, 1310 (Douglas, Circuit Justice, 1974); *Jicarilla Apache Tribe v. Morton*, 471 F.2d 1275 (9th Cir. 1973); *Environmental Defense Fund v. Tennessee Valley Authority*, 468 F.2d 1164, 1177-78 (6th Cir. 1972). In an advisory opinion prepared in connection with *Gifford-Hill*, *supra*, 389 F. Supp. 167, *aff'd*, 523 F.2d 730, the CEQ concluded that the Commission's Rule, 16 C.F.R. § 1.82(d), exempting adjudicatory proceedings to enforce the antitrust laws from the EIS requirement was consistent with NEPA (A. 32). The CEQ reasoned that requiring an EIS would

delay enforcement of the antitrust laws and would cause environmental factors to be weighed disproportionately in the exercise of the Commission's prosecutorial discretion because of the elaborate procedures established by NEPA for the preparation and filing of an EIS. See Section 102(2)(C) of NEPA, 42 U.S.C. § 4332(2)(C). The CEQ further stated that an EIS is not a necessary aid to choosing the most environmentally sound remedy in the event that violations are found; that the issue of available alternative remedies and other environmental considerations can be raised in the course of the enforcement proceedings themselves. This solution would also prevent individuals charged with violating the law from trying to delay their prosecution by engaging in unproductive and time-consuming collateral litigation over the need for an EIS.

Perhaps most illustrative of the error of the District Court are the implications of its decision for other law enforcement proceedings before administrative tribunals and federal courts. For example, if the decision is upheld, then presumably the Department of Justice could be compelled to prepare environmental impact statements in connection with its own antitrust proceedings tried in the judicial forum. Indeed, some of the substantive acts complained of in *Exxon* could have been in large measure the subject of a judicial proceeding brought by the Department of Justice. See Section 1 of the Sherman Antitrust Act, 5 U.S.C. § 1. Similarly the enforcement activities of other regulatory agencies could be stymied notwithstanding the magnitude of violation which they seek to redress.

This was the conclusion reached by the District Court in *Gifford-Hill & Co., Inc. v. Federal Trade Commission*, *supra*, 389 F. Supp. 167, *aff'd* 523 F.2d 730. In *Gifford-Hill*, a similar claim was raised by an administrative respondent to an antitrust proceeding before the Commission. Among the reasons relied on by the District Court

in rejecting the claim was the unending litigation possibilities that would result from application of NEPA to adjudicatory proceedings (389 F. Supp. at 176):

Should NEPA be applied as plaintiff suggests, logic would compel its application to other situations which the Court regards as plainly beyond the ambit of NEPA. Thus, NEPA could be applied to actions of the S.E.C. requiring divestiture of stock where the securities laws have been violated. Such an action is strikingly similar to that before the Court. NEPA could also be applied to F.D.A. actions regarding prohibition of certain drugs. It could be applied to decisions of the Justice Department regarding possible institution of civil or criminal litigation (antitrust suits leap to mind). Yet the Court thinks that these situations were never intended to come under NEPA. So it is with the case at bar.

The decision of the District Court imposing NEPA's EIS requirement upon the adjudicatory functions of regulatory agencies is untenable, has no basis in either the language or legislative history of NEPA, its precedential case law, or the stated views of the CEQ, and is erroneous.

POINT II

THERE HAS NEVER BEEN ANY PROPOSAL OF FEDERAL ACTION BY THE COMMISSION IN EXXON WHICH AS A PRACTICAL MATTER COULD BE THE SUBJECT OF AN EIS.

Even if this Court should conclude, contrary to our previous argument, that NEPA's EIS requirement applies to antitrust adjudications before independent regulatory agencies, it is well established that Section 102(2) (C) of NEPA, 42 U.S.C. § 4332(2) (C), fore-

closes the necessity of an EIS until any major federal action at least reaches the proposal stage; that the mere contemplation of such action does not trigger the requirement. *Kleppe v. Sierra Club*, *supra*, 427 U.S. at 405-06 (1976); *SCRAP II*, *supra*, 422 U.S. at 320 (1975); *Natural Resources Defense Council v. United States Nuclear Regulatory Commission*, *supra*, 547 F.2d at 633, 653 n.57 (D.C. Cir. 1976), *cert. granted*, 97 S.Ct. 1098 (1977); *Sierra Club v. Hodel*, 544 F.2d 1036, 1040-41 (9th Cir. 1976); *Environmental Defense Fund, Inc. v. Morton*, 420 F. Supp. 1037, 1047 (D. Mont. 1976). As the Court observed in *Colorado Public Interest Research Group, Inc. v. Hills*, 420 F. Supp. 582, 586 (D. Colo. 1976):

Any other procedure would generate what has been called in other contexts "a quagmire of hypothetical judgments." The 'triggers' for environmental impact statements must be kept sufficiently well defined to avoid wasteful and possibly destructive misfires of NEPA's shotgun. See *Kleppe v. Sierra Club*, [427] U.S. [390], 96 S. Ct. 2718, 49 L. Ed. 2d 576 (1976).

Given the preliminary stage of *Exxon*, the absence of any concrete proposal of relief and the speculative and non-binding nature of complaint counsel's statement of February 22, 1974 outlining possible relief, the preparation of an EIS is not required by NEPA at this early stage and would constitute an unrealistic and useless effort.

The triggering of the EIS requirement was specifically addressed in *Kleppe v. Sierra Club*, *supra*, 427 U.S. 390. In that case, defendants were officials of the Department of the Interior and other federal agencies responsible for taking action necessary to enable private companies to develop coal reserves on land of the

Government. Plaintiffs, various environmental organizations, described an area known as the Northern Great Plains Region and alleged that the federal officials could not allow further development by private companies and public utilities of coal reserves on land owned or controlled by the Government without preparing a comprehensive EIS on the entire region. The Court of Appeals, in reversing the District Court, found that although there was no *plan or program* for development of the region, nevertheless, the responsible federal officials "contemplated" a regional plan or program and that these officials had sufficient information with which formulate the regional plan they had been "contemplating". Based upon this conclusion, the Court of Appeals remanded to the District Court with instructions that the officials were to delineate their intended role in the further development of the region; that if they decided to control that development, an EIS would be required. *Kleppe v. Sierra Club, supra*, 427 U.S. at 395, 403.

The Supreme Court held that an EIS was not required and reversed the judgment of the Court of Appeals. In so doing, the Court found that there was no proposal for major federal action with respect to the region and held that pursuant to Section 102(2)(C) of NEPA, an EIS is not required until an agency makes a concrete recommendation or report on a proposal for major federal action; the mere contemplation of such action does not trigger the EIS requirement. *Kleppe v. Sierra Club, supra*, 427 U.S. at 406 n.15. As stated therein:

Quite apart from the fact that the statutory language requires an impact statement only in the event of a proposed action, respondents' desire for a regional environmental impact statement cannot be met for practical reasons. In the absence of a proposal for a regional plan of development, there is nothing that could be the subject of the analysis

envisioned by the statute for an impact statement. Section 102(2)(C) requires that an impact statement contain, in essence, a detailed statement of the expected adverse environmental consequences of an action, the resource commitments involved in it, and the alternatives to it. Absent an overall plan for regional development, it is impossible . . . to analyze the environmental consequences and the resource commitments involved in, and the alternatives to, such activity. . . . Where no such plan exists, any attempt to produce an impact statement would be little more than a study along the lines of the NGPRP [Northern Great Plains Resources Program], containing estimates of potential development and attendant environmental consequences. There would be no factual predicate for the production of an environmental impact statement of the type envisioned by NEPA. [Footnotes omitted]

Kleppe v. Sierra Club, *supra*, 427 U.S. at 401-402. See also *SCRAP II*, *supra*, 422 U.S. at 320.

Similarly in *Exxon*, there is no factual predicate for the production of an EIS of the type envisioned by NEPA. Complaint counsel's statement of February 22, 1974, the basis of the District Court's decision, is at best the contemplation of a project which, if ultimately proposed by the agency, might arguably require an EIS at the time of proposal. Even if complaint counsel's statement had come from the Commission—which it did not—it would not trigger the EIS requirement since it does not contain specific proposals of relief but only a general statement of goals; goals that will be refined to specific proposals only as *Exxon* proceeds through discovery and adjudication.

As demonstrated above (pp. 6-7), discovery in *Exxon* will extend for a period of at least five years under

the most favorable of circumstances—circumstances which do not presently exist. Furthermore, given the magnitude of the proceeding, it is reasonable to anticipate that trial before and adjudication by the administrative law judge and then a final decision by the Commission will not come about for a period of several years thereafter.

Moreover, plaintiffs have themselves conceded the tentative nature of complaint counsel's initial statement by their vigorous assertion in the course of the *Exxon* proceeding that any relief in *Exxon* must take into account changes in the industry following the issuance of the complaint in 1973 and must be founded, if at all, on *present* conditions in the industry. To that end, they have filed with the administrative law judge numerous pleadings alleging that "dramatic" changes have occurred in the domestic and international petroleum industry since issuance of the complaint (A. 193-194). They have referred to the elimination of the oil depletion allowance, the regulation of the petroleum industry by the Federal Energy Administration, the nationalization of respondents' interests in foreign petroleum producing properties, the termination of state imposed oil production restrictions in the United States, and this country's increased dependence on foreign crude oil supplies. Respondents have contended that these changes have been so substantial that the allegations in the complaint and complaint counsel's original relief proposals are outdated and should be reviewed and revised (A. 194).

Thus, as stated in the affidavit of Roger Pool, chief complaint counsel in *Exxon*, all information bearing upon the allegations in the complaint which is obtained during discovery and presented at trial will be evaluated before complaint counsel offer their final recommendations of relief (A. 194). Their recommendations will take into account any changes that have occurred in the industry since the issuance of the complaint in 1973, as well as any subsequent changes that may occur during the intervening

years of discovery and adjudication by the administrative law judge, including changes in government policy, changes in the respondents' industrial operations and competitive conditions in the industry, changes in international activities affecting the industry, technological developments and changes in domestic and international consumption patterns (A. 194-195). After the data to be obtained through discovery and the intervening changes affecting the petroleum industry have been analyzed, it may well be that the relief that ultimately may be recommended by complaint counsel will differ substantially from that tentatively offered on February 22, 1974 (A. 195).

The potential environmental consequences of any relief that might be proposed in *Exxon* cannot be analyzed unless and until the proposals for relief are themselves formulated. Thus the requisite stage would not be reached even with the final proposals of complaint counsel since only the relief formulated by the Commission at the conclusion of the proceeding could be the proper subject of an EIS.* In this regard, it is important to note that an adjudication adverse to plaintiffs does not necessarily mean that the Commission will propose the taking of any remedial action. Although it is the usual course for the Commission to propose relief when a violation of law has been found, on occasion the Commission has determined that a violation of law has occurred but ordered no affirmative relief. See, e.g., *Litton Industries*, 85 F.T.C. 333 (1975). In any event, it is not unusual for the Commission's final order of relief to differ substan-

* Even if the Commission's complaint had contained a statement of contemplated relief, the factual predicate necessary for the preparation of an EIS would be lacking. The Commission still could not formulate a meaningful proposal until after relevant information had been discovered and intervening changes in the industry had been taken into account.

tially from that proposed by complaint counsel or even from that ordered by the administrative law judge. See, e.g., *FTC v. National Lead Co.*, 352 U.S. 419, 427-428 (1957); *National Dynamics Corp. v. F.T.C.*, 492 F.2d 1333, 1336 (2d Cir. 1974), *cert. denied*, 419 U.S. 993 (1974); *National Commission on Egg Nutrition*, 88 F.T.C. 89 (1976).

Under such circumstances, to compel the preparation of an EIS at this juncture of *Exxon* would be an unrealistic and useless effort. For example, the most specific of complaint counsel's relief categories is the recommendation that "40% to 60% of respondents' refining capacity in the relevant market should be divested and that 10 to 13 new firms should be established" (A. 218). One cannot realistically analyze the environmental consequences of the recommended divestiture of such refineries or the alternatives thereto without knowing the identity, ownership or location of the refineries that would be divested. Moreover, as to each of these refineries whose divestiture might be ordered, the particular respondent might take any of the following steps, each of which could have different environmental consequences: a) the refinery could be sold; b) if sold, the selected purchaser could be a new entrant into the refining industry or one already engaged therein; c) the purchaser may expand the refinery or retain or even reduce its existing capacity or change the types of products refined; d) the respondent whose refinery has been sold may accept the resulting reduction in its refining capacity or attempt to compensate by building a new refinery or purchasing an already existing one. Moreover, as plaintiffs allege, changes in refinery ownership could affect the operations of a refinery such as the sulphur content of the crude oil received and refined, the percentage of capacity at which it operated, and the means of transportation used for crude oil and refined products.

The futility of preparing an EIS for the other tentative proposals suggested by complaint counsel is even more apparent. One cannot meaningfully analyze the environmental impact of unspecified "limitations" on respondents' joint ventures, processing agreements, and trading of crude oil and refined products. Complaint counsel have not even been able to obtain from respondents basic information about the nature and extent of these industry practices, let alone specify the types of limitations that ultimately may be proposed. Subsequent information may demonstrate, for example, that certain types of joint ventures foster competition and therefore should not be limited at all. Alternatively, the selection of the refineries to be divested may influence the type of joint ventures to be limited or the nature of the limitations.

The tentative nature of complaint counsel's statement demonstrates that a meaningful EIS cannot be prepared for practical reasons. In the absence of specific, identifiable proposals—which all parties agree must come at a much later date in the adjudicatory process—there is nothing that could be the subject of the type of environmental analysis required by NEPA. Given the principle now well established by *Kleppe* and its progeny that Section 102(2) (C) of NEPA forecloses the necessity of an EIS until there has been at least a proposal of sufficient definiteness upon which an EIS can be based, it is clear that an EIS should not now be required in *Exxon*. See *Colorado Public Interest Research Group, Inc. v. Hills*, *supra*, 420 F. Supp. at 586; *Sierra Club v. Hodel*, *supra*, 544 F.2d at 1039; *Environmental Defense Fund, Inc. v. Morton*, *supra*, 420 F. Supp. at 1047-1049. Moreover, a holding that an EIS is not required at this stage of *Exxon* would in no way foreclose the Commission from considering relevant environmental factors before making a final decision to require some action in the nature of relief. See *Gifford-Hill & Co., Inc. v. F.T.C.*, *supra*, 523

F.2d at 733 n.7. Cf. *City of Wilcox v. Federal Power Commission*, (—F.2d—,) No. 74-2123 (D.C. Cir. decided June 30, 1977) Slip Op. at 47.

Thus in *Environmental Defense Fund, Inc. v. Morton*, *supra*, 420 F. Supp. 1037, plaintiffs, various environmental groups, sought to compel the preparation of an EIS in connection with an industrial water marketing program and various federal option contracts for the sale of water from two federally controlled reservoirs. The District Court, relying on *Kleppe*, held that an EIS was not presently required on the following ground (420 F. Supp. at 1048-1049):

This case is in a similar posture to that presented to the United States Supreme Court in *Kleppe*; there is no plan or proposal. Under the marketing program and option contracts, there is nothing that could be the subject of an EIS analysis. A present environmental study of the impact of the ultimate industrial water use would be an unrealistic and useless effort. There is no way that a present evaluation could be made of the environmental impact of all the potential means of putting industrial water to beneficial use. Here, none of the projects of the owners of the option contracts are far enough along with their plans so that the details of the plans are known, and the environmental consequences could be appraised. The fundamental planning, such as the technology, the point of diversion, the route to be followed by the facilities to transport the water, the place of use, the return flow, the quantity of

water to be consumed, the site of the plants, the type and size of the plants, or even the end use, are all unknown at this time.

The state of *Exxon* is far more indefinite than was the alleged federal action in the aforementioned cases. There is no certainty that respondents will be adjudicated to have violated the Federal Trade Commission Act. Even if such violation is found, any projection as to what relief, if any, might be ordered by the Commission would be based upon speculation and conjecture. Accordingly, even considering the tentative relief suggestions of complaint counsel, there is nothing in *Exxon* that could properly be the subject of an EIS at this stage of *Exxon*.

POINT III

THERE HAS NEVER BEEN ANY PROPOSAL OF FEDERAL ACTION IN EXXON WITHIN THE MEANING OF NEPA.

The requirement of an EIS in *Exxon* is foreclosed not only because of its practical futility, but also because of the limiting statutory language of NEPA which does not require the preparation of an EIS until there has been a *proposal of action by the agency*. *Kleppe v. Sierra Club*, *supra*, 427 U.S. at 406 n.15; *SCRAP II*, *supra*, 422 U.S. at 320. *Conservation Society of Southern Vermont v. Secretary of Transportation*, 531 F.2d 637, 639-40 (2d Cir. 1976).

Herein, it is indisputable that there has not been any proposal of relief by the Commission and that the proposal of relief which was the basis of Judge Cannella's decision and which erroneously was thought to have come from the Commission was in fact a tentative statement of contemplated relief by complaint counsel in *Exxon* made exclusively in their prosecutorial capacity. That

statement was never endorsed, approved or even commented upon by the Commission (A. 188). While it is possible that the Commission may ultimately propose similar relief, there is no basis upon which to conclude that complaint counsel's statement of contemplated relief, made at the outset of the proceeding, necessarily reflects the view of the Commission. Given the separate and distinct prosecutorial role of complaint counsel and the adjudicatory role of the Commission as embodied in the Commission's Rules of Practice, one can no more attribute statements of complaint counsel to the Commission than one can attribute statements of a federal prosecutor to the Court.* Thus, there has been no proposal

* This distinction has been upheld repeatedly in the context of Exemption 5 of the Freedom of Information Act, 5 U.S.C. § 552(b) (5) which exempts from disclosure interagency or intraagency communications which would not be available by law to a party other than an agency in litigation with the agency. The interpretive case law has held that pre-decisional statements by agency employees or even individual members of the agency, as opposed to statements by the agency, are not subject to disclosure. Thus in *Sterling Drug, Inc. v. Federal Trade Commission*, 450 F.2d 698 (D.C. Cir. 1971), plaintiff sought disclosure of three types of memoranda prepared in connection with a Commission decision approving a proposed merger: (1) those prepared by Commission staff; (2) those prepared by individual Commissioners; and (3) those prepared by the Commission and which described the rationale for the Commission's decision approving the merger. The Court of Appeals for the District of Columbia Circuit sustained the Commission's claimed exemption with respect to the first two categories and ordered disclosure only of memoranda in the third category. The underlying rationale was that the pre-decisional memoranda contained in the first two categories reflect only the views of individual staff members and/or individual Commissioners within the Commission and would not necessarily accurately portray the Commission's decision. Only the decisional memoranda in the third category were ordered to be released on the theory that they alone necessarily reflect the final agency action. Similarly herein, the statement of contemplated relief by complaint counsel reflects their independent views in their prosecutorial capacity and cannot be attributed to the Commission.

of federal action nor any report or recommendation on a proposal by the Commission. Accordingly, regardless of whether or not NEPA's EIS requirement may ultimately be held to apply to *Exxon*, the EIS requirement has not yet been triggered. Judge Cannella's decision, predicated upon its finding of such a triggering proposal, is therefore erroneous.

POINT IV

THE DISTRICT COURT DEPARTED FROM THE STATUTORY REQUIREMENTS OF NEPA AND ERRONEOUSLY CONCLUDED THAT THERE HAD BEEN AN IRREVERSIBLE COMMITMENT OF RESOURCES WITHIN THE MEANING OF THE ACT.

Although there has never been any proposal of federal action by the Commission, the District Court concluded that unless an EIS were prepared at this stage of *Exxon*, an irreversible and irretrievable commitment of resources would have been made precluding meaningful consideration of environmental issues by the time the Commission were to formulate a redemy. In so ruling, the District Court relied primarily on three decisions: *Harlem Valley Transportation Association v. Stafford*, 500 F.2d 328 (2d Cir. 1974); *Greene County Planning Board v. Federal Power Commission*, 445 F.2d 412 (2d Cir.), cert. denied, 409 U.S. 849 (1972), and *Calvert Cliffs Coordinating Committee v. Atomic Energy Commission*, 449 F.2d 1109 (D.C. Cir. 1971).

This approach to NEPA has been rejected by the Supreme Court in both *Kleppe* and *SCRAP II*. In *SCRAP II*, *supra*, 422 U.S. 289, the Court was presented with a request for an EIS in connection with proposed surcharges and general rate increases approved by the Interstate Commerce Commission. The Court held that a statement

was not required until ICC approval of the railroads' proposals had actually been issued. "[T]he time at which an agency must prepare the final 'statement' is the time at which it makes a recommendation or report on a proposal for federal action." *Id.* at 320. See also *Kleppe v. Sierra Club*, *supra*, 427 U.S. at 402. In so ruling, the Court indicated that insofar as *Harlem Valley, Greene County* and *Calvert Cliffs* hold that an EIS must accompany a statement of contemplated action through the agency review process—prior to final agency formulation of a proposal—they conflict with the language of NEPA. 422 U.S. at 321 n.20.

Instead of following the guidance of the Supreme Court and the language of the statute, the District Court appeared to use a balancing test in reaching its decision that an EIS is required even before the agency issues its complaint. The Court appeared to balance the burden upon the Commission to prepare the EIS and the concomitant adverse effects upon the prosecution of *Exxon* against the alleged importance of determining at the outset of the proceeding whether the severity of the alleged offense justifies the potential environmental cost of remedying it (A. 111). This balancing approach, however, was expressly rejected by the Supreme Court in *Kleppe* with the following admonition (427 U.S. at 406):

A Court has no authority to depart from the statutory language and, by a balancing of court-devised factors, determine a point during the germination process of a potential proposal at which an impact statement should be prepared. Such an assertion of judicial authority would leave the agencies uncertain as to their procedural duties under NEPA, would invite judicial involvement in the day-to-day decision making process of the agencies, and would invite litigation. As the contemplation of a project and the accompanying study thereof do not necessarily result in a proposal for major federal action,

it may be assumed that the balancing process devised by the Court of Appeals also would result in the preparation of a good many unnecessary impact statements. [Footnote omitted].

Similarly herein, Judge Cannella erroneously departed from the statutory language and made an independent determination that an EIS should have been prepared even prior to the issuance of the *Exxon* complaint (A. 93), a conclusion totally at odds with NEPA's mandate.*

The error below, however, is not limited to the departure from the statutory language of NEPA. Even if such departure were permissible, which it is not, there has not been and will not be any irreversible or irretriev-

* The Commission does not contend that Section 102(2) (C) imposes no duties upon an agency prior to its making a report or recommendation on a proposal for action. The statute contemplates that environmental factors will be considered during the evolution of the report or recommendation through its requirement that prior to preparing the EIS, the responsible official "shall consult with and obtain the comments of any Federal Agency which has jurisdiction by law or special expertise with respect to any environmental impact involved." However, pending the issuance of the report or recommendation, the sufficiency of interim consideration of environmental factors is not a matter for judicial review. As the Supreme Court stated in *Kleppe*:

[T]he time at which a court enters the process is when the report or recommendation on the proposal is made, and someone protests either the absence or the adequacy of the final impact statement. This is the point at which an agency's action has reached sufficient maturity to assure that judicial intervention will not hazard unnecessary disruption. 427 U.S. at 406 n.15.

Moreover, there is nothing in the Commission's Rules of Practice to foreclose it from considering environmental factors as required by Section 102(2) (A-B, D-H), 42 U.S.C. § 4332(2) (A-B, D-H) before making a final decision to require some action. *Gifford-Hill & Co., Inc. v. FTC*, *supra*, 523 F.2d at 733 n.7.

able commitment of resources within the meaning of the Act during the pendency of *Exxon* before the Commission. The District Court seemed to suggest that because the agency would have to spend time and money to pursue the prosecution of *Exxon*, the resulting commitment of resources would be so irreversible and irretrievable as to deprive a subsequently prepared EIS of its intended import and influence.

Section 102(2)(C)(v) of NEPA, 42 U.S.C. § 4332 (2)(C)(v), defines "any irreversible and irretrievable commitment of resources" as those "which would be involved in the proposed federal action should it be implemented". Thus, in the NEPA cases upon which Judge Cannella relied, e.g., *Harlem Valley, Green County and Calvert Cliffs*, the commitment of resources discussed was to an integral element of the action in question, i.e., actual construction of a power line, a highway or a nuclear power plant. In *Calvert Cliffs*, for example, the issue was whether the preparation of an EIS in connection with a nuclear facility could follow construction of the facility and await an application by its owner for an operating license. The *Calvert Cliffs* court found that if an EIS were not prepared until after the facility were built, the fact of its prior construction would unduly pressure the agency to approve the license application thereby precluding preparation of a meaningful EIS at the licensing stage and foreclosing genuine consideration of alternatives to the construction and use of the facility. 449 F.2d at 1128. Similarly, in *Scientists' Institute for Public Information, Inc. v. Atomic Energy Commission*, *supra*, 481 F.2d 1079, the issue was at what stage of a research and development program aimed at developing new nuclear energy technologies should an EIS be prepared. The Court held that because the program had moved beyond pure scientific research toward creation of a viable breeder reactor electrical energy industry, and because of the manner in which investment in the new technology was

likely to restrict future alternatives, an EIS was presently required. In so ruling, the Court made the following observation (481 F.2d at 1089):

To wait until a technology attains the stage of complete commercial feasibility before considering the possible adverse environmental effects attendant upon ultimate application of the technology will undoubtedly frustrate meaningful consideration and balancing of environmental costs against economic and other benefits.

In these cases a prompt EIS was required in order to prevent its preparation from becoming a hollow exercise.

Here, however, the proposed federal action as perceived by the District Court is the depletion of natural resources that might result from plaintiffs' compensatory activities in response to the relief suggested by complaint counsel. The expenditure of money and manhours to prosecute a complaint charging violation of the Federal Trade Commission Act has no relationship whatsoever to the depletion of oil and natural gas resources that might result as a response by plaintiffs to an order of divestiture, should such an order ever come about. The expenditure of such resources, therefore, does not constitute an irreversible or irretrievable commitment of resources within the meaning of NEPA. As the District of Columbia Circuit held in *Gifford-Hill & Co., Inc. v. F.T.C.*, *supra*, 523 F.2d at 733 n.7:

We recognize that our holding effectively means that an agency's decisions to institute adjudicatory proceedings, and *a fortiori* its decisions to institute investigations to determine whether adjudication is warranted, are outside the scope of NEPA. Since these decisions in no way foreclose the agency from considering environmental factors before making a final decision to require some action, we

are convinced that this result is proper. The decision to investigate or to adjudicate does not involve the type of "irretrievable commitment of resources" which NEPA insists must follow rather than precede consideration of environmental factors. Cf. *Scientists' Institute for Public Information, Inc. v. Atomic Energy Comm'n*, 156 U.S. App. D.C. 395, 414, 481 F.2d 1079, 1098 (1973); 87 *Harv.L.Rev.* 1054-1059 (1974). [Emphasis added]

If the commitment of resources in *Exxon* be deemed irreversible or irretrievable merely because of economic costs in arriving at a decision in the matter then the inevitable implication is that the extended expenditure of administrative or judicial resources in a civil or even criminal matter undermines the impartiality of the decisionmakers. This theory is without any support in *Exxon* and contradicts well established principles of administrative due process. See *Withrow v. Larkin*, 421 U.S. 35 (1975); *St. Louis University v. Blue Cross Hospital Service*, 537 F.2d 283 (8th Cir. 1976), *cert denied*, — U.S. —, 45 U.S.L.W. 339 (November 29, 1976); *Lopez v. Henry Phipps Plaza South, Inc.*, 498 F.2d 937 (2d Cir. 1974).

POINT V

THE DISTRICT COURT ERRED IN ITS DETERMINATION THAT PLAINTIFFS HAVE STANDING TO MAINTAIN THIS ACTION.

To make the requisite showing of standing, plaintiffs must demonstrate both that "the challenged action has caused them 'injury in fact'" and that such injury is "'within the zone of interests to be protected or regulated'" by NEPA. *Sierra Club v. Morton*, 405 U.S. 727, 733 (1972); *Barlow v. Collins*, 397 U.S. 159 (1970); *Association of Data Processing Service Organizations v. Camp*, 397 U.S. 150 (1970). As to the first requirement, the injury alleged must be sufficiently real and immediate to warrant judicial intervention:

Abstract injury is not enough. It must be alleged that the plaintiff 'has sustained or is immediately in danger of sustaining some direct injury' as the result of the challenged statute or official conduct. . . . The injury or threat of injury must be both 'real and immediate,' not 'conjectural' or hypothetical.'

O'Shea v. Littleton, 414 U.S. 488, 494 (1974).

Regardless of whether plaintiffs have alleged injury to an interest falling within NEPA's intended zone of interests, the injury is too remote and speculative to satisfy the requirement of injury in fact. The only arguably cognizable injury that could befall plaintiffs is that which might result should the Commission order plaintiffs to take remedial action. As explained in Point II, the eventuality of such an order is uncertain and its formulation, if ever, would not come about until the conclusion of *Exxon* and a finding that plaintiffs have violated the Federal Trade Commission Act. Until such

time, at least five and perhaps as much as ten years into the future, the nature of the remedial action that might then be ordered cannot be ascertained. The nature of the injury that might flow therefrom is therefore unknown and certainly too remote and speculative to warrant the conferral of standing.

Plaintiffs have also failed to satisfy the second requirement, for the interest which they seek to protect does not fall within NEPA's intended scope. As the District Court recognized in its supplemental decision denying plaintiffs' application for injunctive relief, plaintiffs' interest herein is to delay and avoid enforcement of the Federal Trade Commission Act through the *Exxon* proceeding (A. 173). Such an interest is not within the zone of interests to be protected or regulated by NEPA.

This was the very conclusion reached by the District of Columbia Circuit in *Gifford-Hill & Co., Inc. v. Federal Trade Commission*, *supra*, 389 F. Supp. 167, *aff'd*, 523 F.2d 730. In *Gifford-Hill*, the plaintiff sought to enjoin antitrust enforcement against it until the Commission had filed an EIS. The environmental injury alleged was—similar to that raised herein—that if divestiture were ordered, the plaintiff would be compelled to open additional mines in order to provide the materials it was then receiving from the challenged subsidiary. 523 F.2d at 731 n.2. The Court of Appeals affirmed the decision of the District Court rejecting the claim and held that the alleged injury

does not affect an interest even arguably 'within the zone of interests to be protected or regulated' by NEPA. NEPA's concern is with protection of the environment, not with the desire of parties to prevent or delay administrative efforts to enforce the antitrust laws. 523 F.2d at 731-732 [Footnote omitted]

In concluding that plaintiffs had standing, the District Court relied in large measure upon the decision of the Tenth Circuit in *National Helium Corp. v. Morton*, 455 F.2d 650 (10th Cir. 1971). In *Helium*, the Tenth Circuit held that the plaintiff, which extracted helium from natural gas and sold the helium to the Government, had standing to challenge the failure of the Secretary of the Interior to file an EIS before cancelling the Government's contracts to purchase helium. This decision, however, is distinguishable on at least two grounds. First, the alleged environmental injury was a direct result of the cancellation of the Government contract, the very purpose of which was to preserve the gas and thus assure an adequate supply for necessary users. See *Gifford-Hill & Co., Inc. v. F.T.C.*, *supra*, 523 F.2d at 732. Here, however, plaintiffs can make no such allegation. As explained above, the only injury which might arguably result from the action in question is too remote and speculative to constitute injury in fact. Second, as the Court of Appeals stated in *Gifford-Hill* (523 F.2d at 732):

The second reason for distinguishing *Helium* from the present case is that the former involved a challenge to an "agency action" under the Administrative Procedure Act (APA) 5 U.S.C. §§ 702, 704 (1970). See 455 F.2d at 654, 326 F. Supp. at 154. As the *Helium* District Court explained, the APA's provision that "[a] person 'suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action'" should have access to judicial review, 5 U.S.C. § 702, played a major role in the court's decision that National Helium had standing to raise the NEPA question. See 326 F. Supp. at 157, discussing *Scanwell Laboratories, Inc. v. Shaffer*, 137 U.S. App. D.C. 371, 424 F.2d 859 (1970). In the present case, however, *Gifford-Hill* must demonstrate its right to challenge the FTC's compliance with NEPA without the aid of the APA, since the de-

cision to institute an adjudicatory proceeding is not an "agency action"—and most certainly not a "final agency action"—made reviewable by the latter statute.

These distinctions apply with equal force in *Exxon*.

Thus, plaintiffs have failed to demonstrate any real or immediate injury in fact and the injuries alleged do not fall within the zone of interests to be protected by NEPA. Accordingly, they lack standing to maintain this action.

CONCLUSION

The decision of the District Court should be reversed.

Dated: New York, New York
July 15, 1977

Respectfully submitted,

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APPENDIX



Statutory Appendix

Exxon was commenced pursuant to Section 5 of the Federal Trade Commission Act. Sections 5(a) (1) and 5(b) of that Act, 15 U.S.C. §§ 45(a) (1) and 45(b) provide in pertinent part as follows:

(a) (1) Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are declared unlawful.

* * * * *

(b) Whenever the Commission shall have reason to believe that any such person, partnership, or corporation has been or is using any unfair method of competition or unfair or deceptive act or practice in or affecting commerce, and if it shall appear to the Commission that a proceeding by it in respect thereof would be to the interest of the public, it shall issue and serve upon such person, partnership, or corporation a complaint stating its charges in that respect and containing a notice of a hearing upon a day and at a place therein fixed at least thirty days after the service of said complaint. The person, partnership, or corporation so complained of shall have the right to appear at the place and time so fixed and show why an order should not be entered by the Commission requiring such person, partnership, or corporation to cease and desist from the violation of the law so charged in said complaint. If upon such hearing the Commission shall be of the opinion that the method of competition or the act or practice in question is prohibited by sections 41 to 46 and 47 to 58 of this title, it shall make a report in writing in which it shall state its findings as to the facts and shall issue and cause to be served on such person, partnership, or corpo-

ration an order requiring such person, partnership, or corporation to cease and desist from using such method of competition or such act or practice. . . .

Adjudicatory proceedings initiated under Section 5 of the Federal Trade Commission Act are governed by the Commission's Rules of Practice, which are contained at 16 C.F.R., Chapter 1. Rule 1.82, 16 C.F.R. § 1.82, contains the Commission's declaration of policy with respect to the implementation of NEPA:

(a) No Commission rule or guide which is a major action significantly affecting the environment will be promulgated unless an environmental impact statement has been prepared for consideration in the decision making, and

(b) No Commission legislative proposal or Commission legislative report on a proposal in an area in which the Commission has primary responsibility, concerning a matter significantly affecting the environment, will be submitted to Congress without an accompanying environment impact statement, except that

(c) An environmental impact statement will not be prepared when the Commission finds that emergency action is necessary. In such instance, the Commission will consult with CEQ and develop a statement promptly after the action, in accordance with CEQ Guidelines, 40 CFR 1500.11 (e).

(d) Nothing in this procedure shall be construed as stating or implying that section 102(2)(C) of NEPA applies to: any investigation made by the Commission for law enforcement purposes; any process or order issued by the Commission in connection with any type of investigation; any agree-

ment of voluntary compliance or consent decrees entered into by the Commission; or any adjudicatory proceedings commenced by the Commission.

Rule 3.11(a) and (b), 16 C.F.R. § 3.11(a) and (b) govern the issuance and form of complaints initiating adjudicatory proceedings before the Commission:

(a) *Complaint*. Except as provided in §3.13, an adjudicative proceeding is commenced by the issuance of a complaint by the Commission.

(b) *Form of complaint*. The Commission's complaint shall contain the following:

(1) Recital of the legal authority and jurisdiction for institution of the proceeding, with specific designation of the statutory provisions alleged to have been violated;

(2) A clear and concise factual statement sufficient to inform each respondent with reasonable definiteness of the type of acts or practices alleged to be in violation of the law;

(3) Where practical, a form of order which the Commission has reason to believe should issue if the facts are found to be as alleged in the complaint; and

(4) Notice of the time and place for hearing, the time to be at least thirty (30) days after service of the complaint.

Pursuant to Rule 3.42, 16 C.F.R. § 3.42, *Exxon* is currently pending before an administrative law judge whose powers and duties are set forth in Rule 3.42(c), 16 C.F.R. § 3.42(c):

(c) *Powers and duties*. Administrative law judges shall have the duty to conduct fair and im-

partial hearings, to take all necessary action to avoid delay in the disposition of proceedings, and to maintain order. They shall have all powers necessary to that end, including the following:

- (1) To administer oaths and affirmations;
- (2) To issue subpoenas;
- (3) To take or to cause depositions to be taken;
- (4) To rule upon offers of proof and receive evidence;
- (5) To regulate the course of the hearings and the conduct of the parties and their counsel therein;
- (6) To hold conferences for settlement, simplification of the issues, or any other proper purpose;
- (7) To consider and rule upon, as justice may require, all procedural and other motions appropriate in an adjudicative proceeding, including motions to open defaults;
- (8) To make and file initial decisions;
- (9) To certify questions to the Commission for its determination; and
- (10) To take any action authorized by the rules in this part or in conformance with the provisions of the Administrative Procedure Act as restated and incorporated in title 5, U.S.C.

Rule 4.7(a) and (b), 16 C.F.R. § 4.7(a) and (b) prohibits all *ex parte* communication concerning the merits of an adjudicatory proceeding such as *Exxon* or any factually related proceeding between the Commission or the administrative law judge and any person

performing an investigative or prosecutorial function in connection therewith:

(a) In an adjudicative proceeding, no person not employed by the Commission, and no employee or agent of the Commission who performs any investigative or prosecuting function in connection with the proceeding, shall communicate ex parte, directly or indirectly, with any member of the Commission, or the administrative law judge, or any employee involved in the decisional process in such proceeding, with respect to the merits of that or a factually related proceeding.

(b) In an adjudicative proceeding, no member of the Commission, administrative law judge, or employee involved in the decisional process of such proceeding, shall communicate ex parte, directly or indirectly, with any person not employed by the Commission, or with any employee or agent of the Commission who performs any investigative or prosecuting function in connection with the proceeding, with respect to the merits of that or a factually related proceeding.

Section 101 of NEPA, 42 U.S.C. § 4331, declares the Congressional national environmental policy as follows:

SEC. 101. (a) The Congress, recognizing the profound impact of man's activity on the interrelations of all components of the natural environment, particularly the profound influences of population growth, high-density urbanization, industrial expansion, resource exploitation, and new and expanding technological advances and recognizing further the critical importance of restoring and maintaining environmental quality to the overall welfare and development of man, declares that it is the continuing policy of the Federal Govern-

ment, in cooperation with State and local governments, and other concerned public and private organizations, to use all practicable means and measures, including financial and technical assistance, in a manner calculated to foster and promote the general welfare, to create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations of Americans.

(b) In order to carry out the policy set forth in this Act, it is the continuing responsibility of the Federal Government to use all practicable means, consistent with other essential considerations of national policy, to improve and coordinate Federal plans, functions, programs, and resources to the end that the Nation may—

- (1) fulfill the responsibilities of each generation as trustee of the environment for succeeding generations;
- (2) assure for all Americans safe, healthful, productive, and esthetically and culturally pleasing surroundings;
- (3) attain the widest range of beneficial uses of the environment without degradation, risk to health or safety, or other undesirable and unintended consequences;
- (4) preserve important historic, cultural, and natural aspects of our national heritage, and maintain, wherever possible, an environment which supports diversity, and variety of individual choice;
- (5) achieve a balance between population and resource use which will permit high stand-

ards of living and a wide sharing of life's amenities; and

(6) enhance the quality of renewable resources and approach the maximum attainable recycling of depletable resources.

(c) The Congress recognizes that each person should enjoy a healthful environment and that each person has a responsibility to contribute to the preservation and enhancement of the environment.

Section 102, 42 U.S.C. § 4332, provides for the implementation of NEPA including, where necessary, the preparation of an EIS:

SEC. 102. The Congress authorizes and directs that, to the fullest extent possible: (1) the policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in this Act, and (2) all agencies of the Federal Government shall—

(A) utilize a systematic, interdisciplinary approach which will insure the integrated use of the natural and social sciences and the environmental design arts in planning and in decisionmaking which may have an impact on man's environment;

(B) identify and develop methods and procedures, in consultation with the Council on Environmental Quality established by title II of this Act, which will insure that presently unquantified environmental amenities and values may be given appropriate consideration in decisionmaking along with economic and technical considerations;

(C) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on—

(i) the environmental impact of the proposed action,

(ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,

(iii) alternatives to the proposed action,

(iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and

(v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

Prior to making any detailed statement, the responsible Federal official shall consult with and obtain the comments of any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved. Copies of such statement and the comments and views of the appropriate Federal, State, and local agencies, which are authorized to develop and enforce environmental standards, shall be made available to the President, the Council on Environmental Quality and to the public as provided by section 552 of title 5, United States Code, and shall accompany the proposal through the existing agency review processes;

(D) study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources;

(E) recognize the worldwide and long-range character of environmental problems and, where consistent with the foreign policy of the United States, lend appropriate support to initiatives, resolutions, and programs designed to maximize international cooperation in anticipating and preventing a decline in the quality of mankind's world environment;

(F) make available to States, counties, municipalities, institutions, and individuals, advice and information useful in restoring, maintaining, and enhancing the quality of the environment;

(G) initiate and utilize ecological information in the planning and development of resource-oriented projects; and

(H) assist the Council of Environmental Quality established by title II of this Act.

★ U. S. Government Printing Office 1977—

714-017-039

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County of New York)

Marian J. Bryant being duly sworn,
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That on the
two copies
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19th day of July, 19 77

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